BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TIM Z. SHORT Claimant VS. **INTERSTATE BRANDS CORP.** Respondent AND **ACE AMERICAN INSURANCE CO.** Insurance Carrier	)	Docket No. **1,058,446**

ORDER

Respondent and its insurance carrier request review of the May 3, 2012[1] preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. James Oswalt, of Hutchinson, Kansas, appeared for claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript with exhibits taken December 20, 2011, the medical report from Dr. Brennen Lucas dated January 16, 2012, and all pleadings contained in the administrative file.

ISSUES

The claimant alleged he suffered work-related repetitive trauma injury to his right knee. Claimant had a history of surgical reconstructive repair to his anterior cruciate ligament in his right knee which had occurred over 20 years ago. Respondent initially sent claimant for treatment but then denied further treatment based upon the argument that claimant's work was not the prevailing factor causing claimant's current right knee condition. Respondent further argued that claimant only established, at best, that his work

[1] Preliminary Hearing was held on December 20, 2011. The order was taken under advisement pending receipt of additional evidence. Dr. Lucas' report was received on January 23, 2012.

aggravated and made symptomatic a preexisting condition and that factual scenario is not a compensable accident under current law.

The Administrative Law Judge (ALJ) found claimant suffered injury by repetitive trauma and the repetitive trauma was the prevailing factor causing the injury.

Respondent requests review of whether claimant's accidental injury arose out of and in the course of employment with respondent. Respondent argues claimant failed to meet his burden of proof to establish repetitive trauma was the prevailing factor causing his current right knee condition. In addition, respondent further argues the medical evidence supports a finding that claimant's work activities made his preexisting condition symptomatic and under current law such an incident is not compensable.

Claimant argues the determination of whether work was the prevailing factor causing his current right knee condition does not require medical evidence and his testimony is relevant evidence to support such a finding. Claimant further argues the medical evidence was equivocal. Consequently, claimant requests the Board to affirm the ALJ's Order.

The issue raised on review is whether claimant suffered repetitive trauma injury arising out of and in the course of employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The facts are essentially undisputed. Claimant was employed as a delivery route driver for respondent. He delivered Wonder Bread and Hostess products to convenience and grocery stores. At each stop he would take the products into the store using a dolly or baker's rack. Claimant testified that the baker's rack filled with bread weighed 600 to 700 pounds and he would have to push the rack up and down the truck ramps at the grocery stores. Claimant testified that he would climb in and out of the truck 70 or 80 times a day.

Claimant noticed that his right knee gradually began to hurt in July 2011, while pushing the racks loaded with product. He reported his knee pain to his supervisor but a couple of weeks later his supervisor was terminated. Claimant then reported his right knee pain to respondent's district manager and claimant was referred to Dr. Daniel Lygrisse.

Dr. Lygrisse first saw claimant on August 10, 2011. The claimant provided a history of right knee pain which started in July and was caused by repetitively getting in and out of his delivery van. Claimant further noted that he had a surgical repair of the anterior cruciate ligament (ACL) on his right knee about 20-22 years ago. Dr. Lygrisse physically examined claimant and had x-rays taken of claimant's right knee. The x-rays revealed

postoperative changes from the prior ACL repair and patellofemoral osteoarthrosis. Neither significant effusion nor fractures were identified. Dr. Lygrisse imposed temporary work restrictions and ordered an MRI.

On August 23, 2011, an MRI study was conducted on claimant's right knee. The MRI revealed:

> 1. Findings compatible with ACL reconstructive surgery, right knee. The anterior cruciate ligament appears to be intact.
>
> 2. Intrasubstance mucoid degenerative changes involving the posterior horn of the medial meniscus.
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> 3. Mild osteoarthritic changes. No fracture or dislocation.[2]

Dr. Lygrisse reviewed the MRI findings with claimant and indicated he was concerned claimant might have a medial meniscus tear. Consequently, he referred claimant to Dr. Anthony Pollock. On September 8, 2011, Dr. Pollock examined claimant. Dr. Pollock recalled that he had performed an ACL reconstruction on claimant's right knee 21 years ago. After reviewing the MRI, Dr. Pollock noted it was hard to identify any significant injury. Dr. Pollock further noted the MRI showed intrasubstance changes but no obvious tear. Dr. Pollock concluded it would be appropriate for claimant to undergo a diagnostic right knee arthroscopy. Consequently, Dr. Lygrisse referred claimant to Dr. Lucas.

Dr. Lucas reviewed claimant's medical records, obtained a history from claimant, took x-rays of claimant's right knee and physically examined claimant on September 14, 2011. Dr. Lucas diagnosed claimant as status post ACL right knee reconstruction with minimal laxity and a right knee medial meniscus tear. Dr. Lucas discussed operative versus non-operative treatment options with claimant and it was determined to proceed with oral steroids. Claimant was released to work with no squatting. Lastly, it was noted that if claimant's knee continued to bother him it was likely that an arthroscopic partial medial meniscectomy would be considered.

The preliminary hearing was held on December 20, 2011, on claimant's request for medical treatment and temporary total disability compensation. At the conclusion of the hearing the record was left open to obtain Dr. Lucas' causation opinion regarding the prevailing factor for claimant's current right knee condition. Dr. Lucas responded in a letter dated January 16, 2012, and opined in pertinent part:

> Mr. Short initially saw Dr. Pollock on 09/08/2011 and then was referred over to me for further evaluation on 09/14/2011. At that time, he did give me a history that at

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[2] P.H. Trans., Cl. Ex. 1.

> work on 06/21/2011 his knee did become achy, which was followed by a catching sensation. Even though he did have ACL reconstruction 20-some-odd years ago, the current meniscus tear may or may not be related to that previous injury. More than likely, it is not as common for a meniscus tear to occur without previous ACL reconstruction. It was also certainly possible that the patient did have a twisting or squatting injury that occurred that day at work on 06/21/2011, but it is obviously difficult to say with 100% certainty one way or the other if repetitive motion was the true cause of his pathology at this time. I would say that his pre-existing condition of an ACL reconstruction 20 years ago is the likely cause of his injury at this time.
>
> In conclusion, Mr. Short's injury and meniscus tear certainly could have been caused by a repetitive motion or a single twisting and/or squatting motion that day at work on 06/21/2011 as consistent with his history. I would not be able to say, though, with 100% certainty I think this is the absolute cause of his meniscus pathology at this time.
>
> I hope this helps to answer your question, although I realize that I am not able to give a definitive answer at this time.[3]

K.S.A. 2011 Supp. 44-508(e) provides in pertinent part:

> 'Repetitive trauma' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. 'Repetitive trauma' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

The evidence established that claimant repetitively pushed racks of product in and out of stores. As he performed his job he gradually began to experience pain in his knee and later diagnostic tests revealed not only his preexisting ACL repair but also a new meniscus tear. The diagnostic clinical tests establish that claimant suffered repetitive trauma injury.

Respondent argues that, at best, claimant merely aggravated his preexisting condition which is not a compensable injury. K.S.A. 2011 Supp. 44-508(f) (2) provides:

> An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

In this instance the claimant's preexisting condition was an ACL reconstruction and mild osteoarthritic changes in his knee. But the repetitive trauma injury resulted in a new

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[3] Dr. Lucas' January 16, 2012 letter to Jennifer Ndiaye.

finding, a meniscus tear, that was not preexisting. Consequently, K.S.A. 2011 Supp. 44-508(f)(2) is inapplicable as the injury did not solely aggravate, accelerate or exacerbate the preexisting condition.

Finally, respondent argues the evidence did not establish that the injury was the prevailing factor in causing claimant's medical condition. K.S.A. 2011 Supp. 44-508(g) provides:

> 'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Respondent argues that Dr. Lucas opined the preexisting ACL reconstruction was the "likely" cause of claimant's meniscus injury and consequently was the prevailing factor. This Board Member disagrees. Simply stated, Dr. Lucas' letter was equivocal regarding the cause for claimant's current condition and concluded with the apology that he was unable to offer a definitive opinion. Initially, Dr. Lucas noted that claimant's meniscus tear may or may not be related to his previous ACL reconstruction. The doctor then noted it was possible the meniscus tear was due to work but the doctor could not be 100 percent certain. The doctor then stated the previous reconstruction surgery was the likely cause of claimant's current condition, again after having said it might or might not be related. The doctor then repeated that claimant's repetitive work activities could certainly have caused the meniscus tear but he was unable to be 100 percent certain. Finally, Dr. Lucas concluded that he was unable to give a definitive answer regarding the prevailing factor in this case. Stated another way, Dr. Lucas never provided an opinion, more probably true than not, regarding what the prevailing factor was for claimant's current knee condition.

The ALJ analyzed the evidence and noted that Dr. Lucas could not say with 100 percent certainty that repetitive trauma caused claimant's current need for treatment. The ALJ further noted that 100 percent certainty is not the standard for claimant to meet his burden and claimant's testimony as well as the entirety of the medical evidence established that claimant suffered personal injury from repetitive trauma at work and the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment. This Board Member agrees and affirms.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as

[4] K.S.A. 44-534a.

permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[5]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 3, 2012, is affirmed.

IT IS SO ORDERED.

Dated this 13th day of July, 2012.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

e: James Oswalt, Attorney for Claimant, joswalt@kslawyer.net
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier, kdonley@mtsqh.com
Nelsonna Potts Barnes, Administrative Law Judge

[5] K.S.A. 2011 Supp. 44-555c(k).